Nos. 99-1257, -1263, -1265

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IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, et al.,

Petitioners,

—v.—

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Respondents.

(*Case captions continued on inside cover*)

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF STATES OF NEW YORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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MASSACHUSETTS AND NEW JERSEY,

Petitioners,

—v.—

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Respondents.

AMERICAN LUNG ASSOCIATION,

Petitioner,

—v.—

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BRIEF OF STATES OF NEW YORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

The northeastern States of New York, Connecticut, Maryland, Maine, New Hampshire, Pennsylvania, Rhode Island and Vermont respectfully submit this brief as *amici curiae* in support of the Petitions for a Writ of Certiorari filed in this matter by the U.S. Environmental Protection Agency (EPA) and Carol Browner, Administrator of EPA; by the States of Massachusetts and New Jersey; and by the American Lung Association (collectively, the "petitions"). The petitions seek review of the D.C. Circuit's decision in *American Trucking Associations, Inc. v. U.S. Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir.), *reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999), to remand EPA's revised eight-hour ozone National Ambient Air Quality Standards for ozone and fine particulate matter ($PM_{2.5}$).

INTEREST OF THE AMICI CURIAE

The northeastern amici States share an interest in obtaining review of the decision below in order to ensure the adequate protection of their residents' health and their environment. Residents of these States suffer from asthma and other respiratory illnesses aggravated by high levels of ozone and $PM_{2.5}$ in the ambient air. Recent studies document an alarming increase in the asthma hospitalization rate in the northeastern United States including, in particular, the lower income neighborhoods of color in the Bronx and Upper

Manhattan, inhabitants of which suffer from rates of asthma that are at least double the national average.[1] As *parens patriae*, New York and the other amici States have a paramount interest in protecting their residents from the debilitating and potentially life threatening effects of asthma and other respiratory illnesses.

The record of the rulemakings at issue in this matter establishes that the revised standards will have a profound impact on public health, eliminating thousands of premature deaths attributable to air pollution each year and preventing tens of thousands of respiratory illnesses attributable to exposure to ozone and fine particulate matter.[2] Specifically, implementation of the revised standards will greatly improve the quality of life of the children and other persons who suffer from asthma, a disease aggravated by exposure to ozone and $PM_{2.5}$. The court below did not question the scientific basis for EPA's determination that the revised standards are needed to protect public health.

The Clean Air Act (the "Act") places primary responsibility for achieving clean air upon the states. To date, the efforts of many eastern states to obtain clean air that meets the old ozone standard have been hampered by the large amounts of ozone and its precursor, nitrogen oxides, that blow into the region from relatively uncontrolled power plants and

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[1] *See* L. Claudia, *et al.*, *Socioeconomic Factors and Asthma Hospitalization Rates in New York City*, 36(4) Journal of Asthma at 344 (1999).

[2] The health benefits of the required standards are described in more detail in the American Lung Association's petition for certiorari.

other large industrial sources, many of which are located in areas classified as attainment with the old standard. *See* Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (Oct. 27, 1998). Some states, like New York and Connecticut, are endeavoring to meet their obligation to comply with the old one-hour EPA standard for ozone by the 2007 attainment date, while others, like Vermont and New Hampshire, find that transported pollution complicates their efforts to remain in compliance with the old standard. Implementation of the EPA's revised eight-hour ozone standards nationwide will greatly facilitate the northeastern states' ability to clean their own air because of the emission reductions that will be required throughout much of the eastern portion of the country, including states to the south and west of the amici States.

The interest of the amici States in obtaining review of the D.C. Circuit's decision extends beyond the implementation of the specific standards at issue. As recognized by Judge Tatel's dissent to the denial of the rehearing petition, joined by Chief Judge Edwards and Judge Garland, the D.C. Circuit's holding threatens to paralyze further EPA efforts to improve air quality, at the expense of the health of residents of the amici States and other states:

> Not only did the panel depart from a half century of Supreme Court separation of powers jurisprudence, but in doing so, it stripped the Environmental Protection Agency of much of

its ability to implement the Clean Air Act, this nation's primary means of protecting the safety of the air breathed by millions of people. App. 91.[3]

Residents of the amici States benefit from a number of EPA programs directed at improving air quality, including EPA's efforts to control interstate transport of ozone and its precursors, and its imposition of more stringent emission control requirements for motor vehicles. Because the poor air quality in the Northeast is attributable in large part to air pollution transported from other states or to motor vehicle emissions that states are barred from regulating, pursuant to section 209(a) of the Act, 42 U.S.C. § 7543(a), the amici States find it extremely difficult to achieve any significant improvement in the quality of their air without EPA's exercise of its authority in other areas to reduce motor vehicle emissions and interstate pollution.

Finally, the ramifications of the nondelegation holding transcend EPA's efforts to obtain clean air for all Americans. The court's nondelegation holding threatens federal efforts to protect the health and safety of Americans under many diverse federal programs. Although the full ramifications of the decision are yet to be determined, it throws into question federal efforts to protect public health and safety in many areas such as automobile safety and airline safety, in addition to

[3] Citations are to the Appendix filed in support of the Massachusetts and New Jersey petition.

environmental protection. The amici States have a fundamental interest in seeing that the health and safety of their residents do not suffer as a consequence of the D.C. Circuit's decision.[4]

SUMMARY OF ARGUMENT

The D.C. Circuit's decision will prevent or, at a minimum, postpone access to cleaner air for all Americans. The D.C. Circuit recognized the overwhelming body of scientific evidence that supported EPA's determination that the current .120 ppm one-hour ozone standard is inadequately protective of public health. Nevertheless, as a result of the D.C. Circuit's holding, the inadequate one-hour standard will be the only protection Americans will have against the health dangers of ozone pollution for many years to come. Even if EPA is able to formulate an "intelligible principle" to govern its setting of revised standards, the Court's holding that new ozone revised standards may only be implemented in accordance with the facially inapplicable subpart 2 classifications and compliance deadlines means that any protection Americans can expect from revised ozone standards will not be realized or, at best, will be postponed even further.

More generally, the D.C. Circuit's decision effectuates a fundamental alteration of the balance of power among the three branches of government in the area of environmental regulation. In the name of adherence to the principle that the democratically-elected Congress should make the fundamental

[4] Connecticut, New Hampshire, New York and Vermont participated in the D.C. Circuit proceedings as amici, submitting joint briefs with Massachusetts and New Jersey, which intervened in the cases.

policy determinations, the D.C. Circuit found inadequate the delimiting principles promulgated by Congress in section 109 of the Act, 42 U.S.C. § 7409, and remanded to EPA to come up with its own "intelligible principle" to govern its decisionmaking processes, which will then be reviewed by the D.C. Circuit. In the second portion of its holding, the D.C. Circuit rejected the agency's practical interpretation of the Act, in favor of the court's own technically intricate, but ultimately unsound reading of the relevant provisions. Both aspects of the D.C. Circuit's opinion have the effect of placing policymaking authority in the hands of the judicial branch, rather than the legislative and executive branches of government that are elected by the populace, and throw into doubt other federal efforts to protect the health and safety of Americans.

ARGUMENT

I. THE D.C. CIRCUIT'S DECISION ON IMPLEMENTATION OF THE NEW EIGHT-HOUR OZONE STANDARDS WILL POSTPONE THE BENEFITS OF CLEANER AIR FOR MUCH OF THE NATION

The D.C. Circuit's holding that any revised eight-hour ozone National Ambient Air Quality Standard ("NAAQS") may only be implemented in accordance with a statutory schedule and classification scheme intended to address the old ozone NAAQS will have significant ramifications for the amici States' efforts to obtain cleaner air. Regardless of whether EPA, on remand, is able to repromulgate the ozone NAAQS in

accordance with the Court's nondelegation holding, the obstacles erected by the court to implementation of the revised standards may prevent the States from implementing those standards.

The D.C. Circuit's determination that EPA must enforce the revised eight-hour NAAQS in accordance with the classifications and attainment dates adopted by Congress in 1990 is premised on a faulty interpretation of the Act's provisions governing implementation of the ozone NAAQS. At the core of the D.C. Circuit's holding is section 181(a)(1) of the Act, 42 U.S.C. § 7511(a)(1), entitled "Classification and attainment dates for 1989 nonattainment areas," which contains as its centerpiece a table that lists classifications and attainment deadlines for meeting the one-hour .120 ppm standard existing at the time of the 1990 amendments.[5] In reaching its holding that this table governs the classifications and attainment dates for areas found to be in noncompliance with the new eight-hour .080 ppm standards promulgated in 1997 (App. 75), the D.C. Circuit paid no heed to the fact that the classification scheme is

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[5] Table 1 of the statutory provision reads as follows:

Area Class	Design Value [ppm]	Primary Standard Attainment Date
Marginal	0.121 up to 0.138	3 years after November 15, 1990
Moderate	0.138 up to 0.160	6 years after November 15, 1990
Serious	0.160 up to 0.180	9 years after November 15, 1990
Severe	0.180 up to 0.280	15 years after November 15, 1990
Extreme	0.280 and above	20 years after November 15, 1990

nonsensical when applied to a .080 ppm standard, rather than a .120 ppm standard, and it failed to explain how a statutory provision with attainment deadlines in the 1990s could possibly govern a revised standard that would not be implemented until after 2000.[6] In the name of allegiance to the statutory text, the D.C. Circuit also disregarded the clear statement in the title of section 181(a)(1) that it only governs "classification and attainment dates for 1989 attainment areas" on the grounds that "a title cannot be allowed to create an ambiguity in the first place." App. 39.

In opposing the granting of certiorari on this issue, industry respondents contend that it is the type of routine statutory interpretation question that is normally not reviewed by the Court. However, the D.C. Circuit's holding, if allowed to stand, throws into doubt the D.C. Circuit's continued adherence to *Chevron* deference. *Chevron U.S.A. Inc. v.*

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[6] Other references in section 181(a) provide further evidence that its provisions are intended to apply only to areas designated as nonattainment with the standard existing at the time of the 1990 amendments. For example, section 181(a)(1) provides that the design value that forms the basis for the classifications should be calculated in accordance with the "interpretation methodology issued by the Administrator most recently before November 15, 1990." Furthermore, section 181(a)(3) provides that the classifications should be made at the time of the designation of an area as nonattainment with the 1990 ozone standard under section 107(d)(4), 42 U.S.C. § 7407(d)(4); there is no procedure for classification under a new or revised standard. Finally, reclassification to nonattainment with the old one-hour .120 standard of areas initially designated as attainment in 1990 is governed by section 181(b)(1), which applies only to areas redesignated as nonattainment with the old one-hour standard under section 107(d)(3), not to areas redesignated as nonattainment with a new or revised ozone standard under section 107(d)(1).

NRDC, 467 U.S. 837 (1984). Instead of deferring to an agency interpretation of section 181(a) of the Act that is consistent with the substance and title of the provision,[7] the D.C. Circuit substituted its own reading of the statute for the reading adopted by EPA. At best, the cross-reference in section 181(a)(1) to section 107(d) rather than just 107(d)(4), which provides the entire shaky foundation for the D.C. Circuit's interpretation, creates an ambiguity in the statute, requiring that deference be given to EPA's reasonable interpretation.[8] The ambiguity of the Act's provisions regarding implementation of revised standards is also reflected by the inability of the panel

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[7] Under similar circumstances, this Court has found that the title of a statute provides valuable evidence of Congressional intent in enacting a statute. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998); *Immigration & Naturalization Service v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991); *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989); *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-89 (1959).

[8] In his opinion concurring in part and dissenting in part, Judge Tatel recognized that it is not the title of section 181(a)(1) that creates the ambiguity but that "the ambiguity in this statute . . . appears in the text of Subpart 2 itself." App. at 77. He explained:

> "As the agency argues, it is thus difficult to see how Subpart 2 can 'specifically provide[]' attainment dates for areas that are designated nonattainment under the new standard but are not covered by table 1. . . This gap in Table 1 makes it at least ambiguous whether Subpart 2 '*specifically* provide[s]' classifications and attainment dates for *all* areas exceeding the revised 0.08 ppm ozone NAAQS." *Id.*

As explained by Judge Tatel, it is for EPA, not the D.C. Circuit, to interpret an ambiguous statute, an interpretation that the D.C. Circuit is bound by *Chevron* to follow if reasonable. App. at 81.

and Judge Tatel to agree on a way to conform the provisions of subpart 1 and subpart 2.[9] However, rather than ensuring that the policy decisions are made by Congress and implemented by executive agencies, the D.C. Circuit's refusal to accord deference to EPA's reading of the statute effectuates a judicial usurpation of policymaking authority. To the extent that the D.C. Circuit's approach in this case signals a weakening of the principle of *Chevron* deference, federal agencies will find it increasingly difficult to fulfill their obligation to serve the public.

Furthermore, implementation of the revised standards will be hindered by the many uncertainties inherent in the court's treatment of the implementation issues. For example, does the panel's opinion allow the implementation of the revised ozone standards under subpart 1 in the large portions of the nation that do not fall into one of the subpart 2 classifications (i.e. areas that do not meet the revised eight-hour standard of .080 but do meet the old one-hour standard of .120)? If Judge Tatel is correct that subpart 1 provides the deadlines for areas that meet the old standard, does that mean

[9] On rehearing, Judge Tatel concurred in the panel's decision, as modified, because it "leaves open the possibility that EPA can enforce the new ozone NAAQS without conflicting with subpart 2's classifications and attainment dates." (App. 76). Judge Tatel stated that, in his view, "[s]ubpart 2 continues to govern those areas covered by Table 1, just as it did under the old NAAQS, but in areas that have attained the old standard, nothing precludes enforcement of the new standard under subpart 1." (App. 81). However, Judge Tatel's belief that "nothing precludes the enforcement of the new standard under subpart 1" (App. 81) appears to conflict directly with the panel's holding that "[s]ubpart 2, not subpart 1, provides the classifications and attainment dates for *any* areas designated nonattainment under a revised ozone NAAQS." (App. at 39-40) (emphasis supplied).

that EPA must provide those areas with at least five years after they meet the old standard for compliance with the new standard? The apparent disagreement between Judge Tatel and Judges Ginsburg and Williams regarding the meaning of the D.C. Circuit's decision highlights the difficult task facing EPA and the states in conforming their conduct to the decision, making it likely that their attempts to implement the revised primary ozone NAAQS will be tied up in litigation regarding the meaning of the D.C. Circuit's decision for years to come.[10]

II. THE D.C. CIRCUIT'S NONDELEGATION HOLDING IS CONTRARY TO THIS COURT'S ESTABLISHED PRECEDENT AND THROWS INTO DOUBT FEDERAL EFFORTS TO PROTECT THE HEALTH AND SAFETY OF ALL AMERICANS

In its initial opinion, and in the opinion denying rehearing, the D.C. Circuit resuscitated the nondelegation doctrine, holding that, in the absence of a narrowing agency interpretation, section 109 of the Act effectuates an

[10] In its petition, EPA argues persuasively that the D.C. Circuit erred by reaching out to address the propriety of EPA's plan for implementation of the revised ozone NAAQS, an issue that was not ripe for consideration and not squarely before the court. The apparent failure of Judge Tatel and the panel to agree on the meaning of the D.C. Circuit's holding is directly attributable to the court's error in reviewing non-final agency action, rather than waiting for the agency to take concrete steps to implement the revised NAAQS. In the absence of review by this Court, public health and the environment will be threatened by the delays in implementation of the revised standard that will result from the inevitable litigation over the meaning of the D.C. Circuit's decision.

unconstitutionally broad delegation to EPA. Despite the efforts of industry respondents to recast the decision as a rather mundane and uncontroversial question of administrative law,[11] the court's holding clearly and necessarily includes a determination that the text of section 109 does not contain the "intelligible principle" found by the court to be required by the Constitution to confine administrative decisionmaking. Thus, the D.C. Circuit remanded the case to EPA to articulate another intelligible principle -- other than the principle actually found in the statute -- to govern its decisionmaking.

The doctrinal foundations of this determination are puzzling: having found the criteria articulated by Congress to be constitutionally inadequate, the D.C. Circuit is now inviting EPA to conjure up alternative principles to guide its own exercise of discretion. As explained by Judge Silberman's dissent from the denial of rehearing, this determination turns the nondelegation doctrine on its head, divorcing it from the underlying principle that it is the democratically-elected Congress, rather than appointed administrative agency officials, that should make the fundamental policy determinations. *See* App. 86-88.

The D.C. Circuit's holding threatens to alter profoundly the nation's health and regulatory framework. In finding that section 109 does not contain the required "intelligible principle," the court departed from decades of precedent

[11] *See, e.g.*, Brief in Response for the Respondents Appalachian Power Co., et al., at 13; Brief in Response for Respondents American Trucking Associations, Inc., et al., at 11-14.

upholding even broader delegations.[12] As explained by Judge Tatel in dissent, joined by Chief Judge Edwards and Judge Garland, "the Clean Air Act's requirement that EPA set air quality standards 'requisite to protect public health' with 'an adequate margin of safety' based on criteria that 'accurately reflect the latest scientific knowledge' is far more specific than the sweeping statutory delegations consistently upheld by the Supreme Court for more than sixty years." App. 90. *See also* EPA Pet. at 11-19.

The delegation at issue is also narrower than many delegations of regulatory authority found in other statutes intended to protect public health and safety. For example, the federal statutes governing pesticide residues in foods and hazardous waste transportation contain delegations for adoption of regulatory standards that are more open-ended than EPA's authority to promulgate NAAQS. *See* 21 U.S.C. § 346a (pesticide residues in food);[13] 42 U.S.C. § 6923(a) (hazardous waste transportation).[14] EPA's discretion in adopting new or

[12] *See, e.g., Mistretta v. United States*, 488 U.S. 361, 373 (1989); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-226 (1943); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *FPA v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944); *Touby v. United States*, 500 U.S. 160 (1991).

[13] Under section 408(b) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 346a(b), EPA may establish a tolerance for levels of particular pesticides on food if EPA determines "that there is a reasonable certainty" that no harm will result from exposure.

[14] Section 3003 of the Solid Waste Disposal Act, 42 U.S.C. § 6923(a), requires EPA to promulgate standards for the transportation of hazardous waste "as may be necessary to protect human health and the

(continued...)

revised NAAQS is also more circumscribed than the authority of the National Highway Traffic Safety Administration (NHTSA) to promulgate motor vehicle safety standards, which is limited only by the requirement that the standards be "practicable, meet the need for vehicle safety, and be stated in objective terms." 49 U.S.C. § 30111(a). NHTSA's obligation to "consider relevant available motor vehicle safety information" (*id.* at § 30111(b)(1)) is less restrictive than the requirement that the NAAQS be "based on" on air quality criteria (42 U.S.C. § 7409(b)(11); and its duty to "consult" with other agencies (*id.* at § 30111(b)(1)) is more open-ended than EPA's obligation to consider, and explain any departure from, the CASAC recommendations. 42 U.S.C. § 7607(d)(3). Rules relating to airline safety are also promulgated under an equally broad delegation.[15]

Thus, unless the D.C. Circuit's ruling is reversed by this Court, it may lead to the undoing of federal regulations regarding such important matters as airline safety and automobile safety, in addition to environmental protection. A

(...continued)
environment."

[15] The Federal Aviation Administration (FAA) promulgates standards governing airline safety under 49 U.S.C. § 44701. Pursuant to section 44701(c), FAA is required to carry out this responsibility "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." In doing so, the FAA is required to "consider . . . the duty of an air carrier to provide the highest possible degree of safety in the public interest; and . . . differences between air transportation and other air commerce." This standard is similar to EPA's obligation to enact standards "requisite to protect public health" with an "adequate margin of safety."

decision joined by only four of the eleven members of the D.C. Circuit should not be allowed to effect such a profound alteration of this nation's health and safety regulatory framework without review by this Court.[16]

CONCLUSION

For the reasons set forth above and in the petitions, the Court should grant certiorari in these cases.

Dated: March 28, 2000

Respectfully submitted,

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[16] Two of the eleven members of the court did not participate.